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No. 08-314

Supreme Court, U.S.
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In The

# Supreme Court of the United States

DOUGLAS V. LANE,

*Petitioner,*

v.

STATE OF PENNSYLVANIA,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania**

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

1. The Superior Court of Pennsylvania held below that Petitioner's double jeopardy claim, U.S. Const. amends. V and XIV, raised for the first time on appeal, was thus waived. *See,* Pet. App. 6. As noted by Respondent, this decision is completely consistent with Pennsylvania caselaw. *See,* BIO n.4. What Respondent fails to acknowledge, however, is that Pennsylvania and several other jurisdictions are out of step with virtually every U.S. Court of Appeals, and the decisions of numerous other states which hold that some level of review is required when an issue of double jeopardy is first raised in an appellate context. *See,* Pet. 5-12. It is this conflict, and the serious constitutional implications it represents, which are rooted in the question presented by Petitioner in seeking certiorari review. *Id.* at i.

Instead of admitting such a conflict, however, Respondent mistakenly addresses a question *not* raised, namely the applicability of this Court's holding in *Oregon v. Kennedy,* 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982) to the present case. By not reaching the issue presented in the petition, Respondent's brief in opposition is of little value and does nothing to diminish the compelling need for this Court's action. Whether a double jeopardy claim is waived if not raised in the trial court is a question with no definitive answer given the wide and increasingly divergent opinions of state and federal courts. Without this Court's intervention, an unacceptable

and damaging split will only widen, and inconsistent constitutional interpretation be allowed to fester.

In an obvious effort to divert the Court's attention from the compelling question actually raised in this case, Respondent attempts to suggest that the procedural circumstances below render that question moot. Underlying this misguided approach is the fact that Petitioner's first trial ended in a mistrial due to the presentment of charges which were barred by the applicable statute of limitations. *See*, Pet. at 3. Whatever implications there may be for double jeopardy consideration after declaration of a mistrial, those concerns are not raised in the present case. In fact, the double jeopardy aspect of the question at issue here is completely unrelated to the circumstances surrounding the mistrial in Petitioner's first case, and instead focus solely on whether the Superior Court's finding of waiver[1] regarding a completely different species of double jeopardy was constitutionally sound.[2] As such, not only is *Kennedy* irrelevant to the question presented, it is completely inapplicable to this case. While this alone negates the premise of

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[1] Importantly, the Superior Court did *not* invoke *Kennedy* in dismissing the double jeopardy claim at issue in the present question. Pet. App. at 6.

[2] Petitioner raised, at both the trial and appellate levels, a separate double jeopardy claim arising from the trial error which precipitated the mistrial, and was unsuccessful each time. BIO App. 1; Pet. App. 3. This aspect of double jeopardy is *not* implicated in the current question presented.

Respondent's argument, review of *Kennedy* in light of the underlying facts of this case is instructive.[3]

2. In *Kennedy*, this Court addressed a question of the double jeopardy clause's applicability after a defense motion for mistrial is granted, holding that in such a case, retrial is generally not barred unless prosecutorial action intentionally "goaded" the defendant into seeking the mistrial. Because "the procedural posture of [a] case crucially impacts the double jeopardy question," *Haynes v. State*, __S.W.3d__ (Tex. Crim. App. 2008 WL 1883463), it is important to note that although mistrial was ordered in the present case, the underlying facts and the circumstances surrounding the mistrial are so vastly different from those in *Kennedy* as to render that case of no import here.

Unlike *Kennedy*, mistrial in this case came *after* the close of the prosecution's case, and after judgment had been rendered on several defense motions for judgment of acquittal based on the evidence (granting some, denying others), including a specific sufficiency argument related to the failure to identify

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[3] Even if *Kennedy* were applicable here, it is illogical to suggest that one form of double jeopardy protection (i.e., prior acquittal, or as in this case, sufficiency of evidence) cannot occupy the same reviewing stage as a question raised under *Kennedy*. *See, e.g., U.S. v. Wallach*, 979 F.2d 912 (2nd Cir. 1992) (addressing both a *Kennedy* and sufficiency double jeopardy question).

Petitioner.[4] NT (1) Trial March 3, 2005 at 49; NT(2) Trial March 3, 2005 at 3; NT Trial March 4, 2005 at 7. More importantly, however, the mistrial motion was explicitly *conditional*, with Petitioner's then-counsel specifically declaring that it was made "without *waiving any other arguments* . . . " NT Trial, March 4, 2005 at p.6 (emphasis added). Not only did Respondent *not* challenge this assertion, it *concurred* in the mistrial request. *Id.* Neither Respondent nor the trial court itself made any statement nor took any step to diminish the conditional nature of Petitioner's motion, nor suggest in any way that its grant *would* constitute the waiver Respondent now suggests. Instead, the trial court merely declared that "based upon the motion of the defense *and the concurrence* by [Respondent], we will call a mistrial . . . " *Id.* at p.7 (emphasis added).

By attaching a "non-waiver" condition to his mistrial motion, Petitioner preserved his right to seek double jeopardy protection from any further prosecution. *See, U.S. v. Huang,* 960 F.2d 1128 (2nd Cir. 1992); *accord, U.S. v. Bauer,* 173 F.3d 862 (9th Cir.

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[4] While defense counsel's motions were in such varied forms as requests for "dismissal" or "demurrer," Pennsylvania characterizes all such challenges to the sufficiency of evidence at the close of the prosecution's case as motions for "judgment of acquittal." *See,* Rule 606, Pa.R.Crim.P. (Comment). As this Court has noted, judgment at this stage of a Pennsylvania proceeding has significant double jeopardy implications. *See, Smalis v. Pennsylvania,* 476 U.S. 140, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

1999). In making the mistrial motion conditional, Petitioner lent credence to the concept that "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of [prosecutorial] error." *U.S. v. Dintz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976).

If, on the other hand, this non-waiver condition were *not* incorporated into the trial court's order, then the mistrial would have been "declared without [Petitioner's] consent . . . " *U.S. v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), thus thwarting the requirement that without this consent such an order can issue only if supported by "manifest necessity," *id,* likewise inviting a viable double jeopardy challenge. *See, Huang, supra.*[5] In either case, it is simply disingenuous and misleading for Respondent to attempt to deflect attention from the real issue at hand, namely the vast conflict surrounding the constitutional question of whether a double jeopardy claim may be raised for the first time on appeal. Respondent has no answer to that question other

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[5] Given the circumstances in this case, the double jeopardy implications of the insufficient evidence at Petitioner's first trial raise a constitutional question which is both ripe and appropriate for appellate review. *See, U.S. v. Wood*, 950 F.2d 638 (10th Cir. 1991) (distinguishing the circumstances in a case such as the present one, from that in *Richardson v. U.S.*, 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984), where a "manifestly necessary" mistrial was declared due to a hung jury.)

than to advise this Court that Pennsylvania consistently answers it in the negative.

3. As outlined in the instant petition, the compelling reasons for issuance of the writ remain, especially given the collision of such concepts as "waiver" versus "forfeiture" of constitutionally precious rights which this case represents. *See, e.g., U.S. v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Respondent, by lashing itself entirely to its misplaced *Kennedy* argument, offers no rebuttal to the point that the conflicting positions on the question presented in this case deeply impact the administration of a constitutionally guided criminal justice system. It is neither unimportant, however, nor immaterial to the present case that "wavier" and "forfeiture" have very different meanings, and impact in significantly different ways upon the rights implicated by each. *Id.* ("waiver" of a right does not defer it, but fully "extinguishes" it, where "forfeiture [by] fail[ure to] timely assert[ ] a right . . . does not . . . " *id*). If left untouched by this Court's intervention, the fundamental right to be free from twice being placed in jeopardy will be "extinguished" in the "rule of waiver" states noted in the petition, but given review in those places with conflicting opinions, despite identical procedural circumstances in each. Such a constitutionally insulting circumstance cannot be allowed to stand. Given the simple and stark decision of the court below, *see,* Pet. App. 6, this case remains

the perfect vehicle by which a problem of this magnitude may be addressed and corrected.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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